No. 11,074.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

M. R. LUSTER and A. M. LUSTER, individually and as co-partners, doing business as Sunbeam Furniture Sales Co.,

Appellees.

APPELLEES' REPLY BRIEF.

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Jurisdictional Statement.

The United States District Court for the Southern District of California assumed jurisdiction of the cause under Section 205(c) of the Emergency Price Control Act, as amended (45 Stat. 23, 50 U. S. C., App., Sec. 901, *et seq.*). The jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is invoked under Section 128 of the Judicial Code (28 U. S. C., Sec. 225).

Statutes and Regulations Involved.

Appellant's Brief, page 9, sets forth in detail the Statutes and Regulations involved in this action.

Statement of Facts.

The Statement of Facts as set forth in Appellant's Opening Brief (p. 3) is substantially correct. However, it should be noted that upon the trial the evidence showed that the defendants and appellees had, after the Office of Price Administration had called their attention to it, prepared a set of records which they thought were in substantial compliance with Section 1499.12 of the General Maximum Price Regulation. These records gave a full description of each item, indicated where it was bought and futher indicated the competitor with whom the defendants had compared their individual item in order to arrive at a selling price. [Defendants' Exhibits A to P, incl.]

The Court below found that these records did not show "as precisely as possible the basis on which they determined their maximum prices for said household furniture and miscellaneous commodities which they sold as wholesalers subsequent to October 1, 1942." [Tr. R. 35.] In accordance with its findings the Court issued a restraining order and injunction, in effect calling upon the defendants to improve their methods of pricing and to more clearly indicate the basis upon which their maximum prices had been arrived at.

Appellant submitted to the Court the findings of fact and conclusions of law. Upon motion made by the appellees the Court ordered said findings of fact and conclusions of law amended by excluding the portion italicized below:

> "2. Selling, delivering or offering to sell or deliver said commodities at prices in excess of the maximum prices established therefor by the Regulation, *or by any other regulation establishing maximum prices for said commodities;* and

3. Doing or omitting to do any other act in violation of the Regulation *or of any other regulation establishing maximum prices for said commodities;* and

4. *Offering, soliciting, attempting or agreeing to do any of the foregoing."*

The Court further ordered the judgment amended as set forth in Appellant's Brief, page 4.

I.

No Error of Law Was Committed by the District Court in Amending the Judgment. The District Court, in Amending the Judgment, Exercised Its Discretion in Permitting Defendants to Challenge the Validity of Future Amendments to the General Maximum Price Regulation in the Emergency Court of Appeals. The District Court Thought It Proper to Permit Defendants to Challenge the Validity of Said Amendment Either by the Procedure Provided for Under Sections 203 and 204 (e to d) of the Act or Under the Procedure Provided for in Section 204(e) of the Act.

It is admitted that an error of law committed by the trial court is reviewable and will be corrected on appeal. However, an examination of the "Order of Court Amending Findings of Fact, Conclusions of Law and Judgment" filed December 14, 1944 [Tr. R. 27] reveals that the basis for the Court's order amending the judgment was not, as contended by appellant, the fact that the Court thought that its original action would have deprived defendants of the right to challenge the validity of any amendments or additions to the General Maximum Price Regulation, but rather the order of the Court was based on the evidence as presented at the trial; which was

that the defendants had made in good faith and honest attempt to comply with the regulation, had established a set of records and had sought to show the basis upon which they priced. It is apparent from a reading of the Order that the Court was of the opinion that, in the proper exercise of its discretion, it had power to leave open to the defendants in any future action which might arise (which the Court felt would not happen in view of the evidence presented at the trial) the right to challenge the validity of future amendments to the regulation not only by the procedure outlined in Sections 203 and 204 (a) to (d) of the Act, but also by the second procedure provided for in Section 204 (e) of the Act. The Court felt that were the defendant to be prosecuted again by the Office of Price Administration and were this prosecution based on an unintentional, minor and undamaging violation of the Act that the defendants should have the right to request the District Court for permission for leave to file with the Emergency Court of Appeals a complaint against the Administrator, setting forth objections to any provision which the defendants were alleged to have violated. This is indicated by the language used in the order:

> "If future violations are found to occur by the plaintiff another action can be instituted. It is not the policy of this court to keep defendants in a state of suspended animation or hold above their heads the Sword of Damocles which may fall at any move, not knowing when they will be brought into Court on contempt proceedings for violation, real or alleged." [Tr. R. 30.]

A reading of the Order made by the District Court will indicate that the Court was at all times aware that were

it to issue the broad injunction requested by the appellant that the defendants would be deprived of the privilege granted under the second procedure. The Court exercised its discretion to permit the defendants the use of the second procedure *per se* without the necessity of requesting a continuance in a possible contempt procedure. Appellant states (Appellant's Br. p. 11) that the second procedure "was not intended to be available to one who fails to act in good faith and with the utmost diligence;" and further, "Therefore, even if the injunction did not embrace future amendments and substitutions the defendants would not be entitled to invoke the second procedure in any proceeding brought to enforce such amendments and substitutions for the simple reason that they would not be able to make the necessary showing." (App. Br. p. 11.) It is conceivable that the defendants could well act in good faith and with full intent to comply with the requirements and obligations imposed by any future amendments to the regulation, and still be in technical violation of said amendments. The court below foresaw this possibility and, being of the opinion that the defendants were not intentional violators, chose to restrict the injunction and to close the case so as to permit defendants to invoke a defense of good faith in any future action in requesting a continuance in order that they might file a protest with the Emergency Court of Appeals. The Court was of the opinion that it did not wish to place the defendants in the position of being in automatic contempt of an injunction decree while the defendants were possibly contesting the validity of any future amendments in the Emergency Court of Appeals. If the Court had been of the opinion that the defendants' violation was intentional, gross and calculated it is conceded that it could have well made the injunction as broad

as it desired so as to include any future amendments issued to the regulation in order to assure that the defendants would comply with the regulation. However, the Court was of a different opinion in this case and in the use of its discretionary power, after hearing the evidence, made the injunction a limited one.

II.

The Judgment Was Amended in the Exercise of Discretion by the District Court. The District Court in the Proper Exercise of Its Discretion Had Power to Make the Injunction as Broad or as Narrow as It Saw Fit.

Granting or refusing of injunctive relief rests within the jurisdictional discretion of the trial court and its action in the matter will be substantiated on review by an appellate court where the power has not been abused.

U. S. v. Corrick, 298 U. S. 435, A 80 L. Ed. 1263;

Continental Illinois Bank v. Chicago R. I. & P. R. Co., 294 U. S. 648, 79 L. Ed. 1110;

Rogers v. Hill, 289 U. S. 582;

Alabama v. U. S., 279 U. S. 229;

28 *Am. Jur.* 500.

It is well settled that in these cases the Court may exercise its discretion broadly and the exercise of discretion should be based upon the evidence appearing upon trial of the cause.

As the Supreme Court said in *Hecht v. Bowles*, 321 U. S. 321, 328, 64 S. Ct. 587:

> "It appears apparent on the face of Section 205(a) that there is some room for exercise of discretion on the part of the Court,"

and further, at page 329:

> "The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

and at page 330:

> "Hence we resolve the ambiguities of Section 205 (a) in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect. U. S. v. Morgan, 307 U. S. 183, 194 and cases cited."

The extent to which the discretion of the Court may be exercised in granting or refusing to grant an injunction, or even in limiting the terms and applicability of the terms if granted, is well illustrated in *Bowles v. Town Hall Grill,* 145 Fed. (2d) 680 (C. C. A. 1st), wherein the Office of Price Administration sought an injunction to restrain the defendant from selling *any* food items in excess of prices established by the General Maximum Price Regulation. However, the Court felt that this type of injunction would not be applicable to the particular case, and in the exercise of its discretion limited the injunction to restraining the defendant from selling "any food in which lobster and poultry or both are the chief ingredients and beverage items in which gin is the chief ingredient" in excess of ceiling prices (p. 681).

The Court stated therein:

> "It seems to us too evident to warrant discussion that when the District Court said that in its *'opinion'* the injunction granted should be a limited one it was exercising its discretion." (Italics added.)

It should be noted that in the instant case the District Court based its limitation of the injunction upon its "opinion" that to require defendants to be bound by the regulation and all future amendments thereto would constitute a hardship on the defendants not warranted by the facts. The Court further exercised its discretion in refusing to retain jurisdiction of the cause because of its "opinion" that based upon the facts that defendants should not "be kept in a state of suspended animation." [Tr. R. 30.]

In *Bowles v. Town Hall Grill (supra)* the Circuit Court, in following *Bowles v. Hecht (supra)*, characterized the power of the trial court in entering these decrees under the Emergency Price Control Act as follows:

> "Now it seems clear to us that if under Section 205(a) a District Court has power in its discretion to deny injunctive relief altogether under some circumstances, and has power to mould its decrees to fit the necessities of particular situations as they arise, and if equity is distinguished by flexibility rather than rigidity so that it may function as the instrument for nice adjustment and reconciliation between competing public interest and private needs, a District Court sitting in Equity must have power, if it decides to enjoin, to grant only a limited injunction when circumstances warrant such action. To hold otherwise

would be to fly in the face of traditional equity practices which the Supreme Court has said Congress did not intend to alter when it enacted the Emergency Price Control Act of 1942." (P. 682.)

And:

". . . the scope of injunctive relief in cases of this sort is discretionary and that on the record before us there appears no abuse of discretion in giving only limited relief."

In a decision applicable to the facts herein, this Court stated that a District Court may in its discretion withhold an injunction under the Emergency Price Control Act of 1942 (50 U. S. C. A., App., 901 *et seq.):*

"To prevent in the future that which in good faith has been discontinued before the commencement of a suit, in the absence of any evidence will, or is likely to be repeated in the future."

Bowles v. Huff, 145 Fed. (2d) 428, 431 (C. C. A. 9th).

In *Bowles v. Socher,* 145 Fed. (2d) 186 (C. C. A. 2d), the Office of Price Administration sought to obtain an interlocutory injunction restraining defendant from

". . . doing or omitting to do any other act in violation of said regulation as *heretofore* or *hereafter amended.*" (Italics added.)

The District Court declined to issue an injunction so worded and the Circuit Court of Appeals on appeal held that it was a proper exercise of discretion on the part of the District Court to refuse to issue such a broad injunc-

tion. This case would seem to be directly in point upon the problem of whether or not the refusal of the District Court to issue an injunction in the terms originally requested by plaintiff and appellant herein is an error of law.

In the *Socher* case the Circuit Court of Appeals for the Second Circuit ruled that the lower court's refusal to issue this type of an injunction was not a matter of law and the breadth of the injunction was a matter for the trial court's discretion.

In *Bowles v. May Harwood Co.*, 140 Fed. (2d) 914 (C. C. A. 6th), cited by appellant (App. Br. p. 13), the Court drew a distinction between the past acts of the defendant showing a tendency to violate present regulations, in which event an injunction will and should be issued to restrain defendant from violating the regulation and future amendments thereto, and present acts by the defendant indicating a tendency to violate future possible regulations, wherein an injunction will not and should not be issued. The Court states:

> "If by this prayer, he (the Administrator) seeks to restrain violation of price ceilings not presently established by existing regulations and so to restrain acts which, though presently lawful may in the future become unlawful by reason of Administrative regulations hereafter adopted, the injunction sought manifestly is too broad, for courts will not restrain future acts when there is no factual basis for determining whether such acts are closely related to or of the same character as the unlawful acts which form the basis of the complaint."

It is submitted that the lower court herein followed the decision in the *May Hardwood Co.* case in refusing to re-

strain the defendants from violating future possible amendments to the General Maximum Price Regulation, for it appeared at the trial that there was no factual basis, nor did there exist a logical probability, that based upon the defendants' past violations of the General Maximum Price Regulation that the defendants would be inclined to violate future amendments to the General Maximum Price Regulation.

III.

The District Court in the Proper Exercise of Its Discretion Could Limit the Injunction if It Found That the Defendants Had Acted in Good Faith or Had Ceased and Discontinued the Complained of Practices.

A review of the evidence presented upon the trial discloses that the defendants herein at all times acted in good faith and desired to comply with the regulation. With this in mind it is well settled that the court below acted within its jurisdictional power to limit the injunction to the terms specified. See:

Bowles v. 870 Seventh Avenue Corp., 150 Fed. (2d) 819, 822-823;

Bowles v. Lake Lucerne Plaza, Inc., 148 Fed. (2d) 967, 970 (C. C. A. 5th).

If the Court was of the opinion that the defendants once apprised of their incorrect methods of keeping records under Section 1499.12 (a) of the General Maximum Price Regulation would correct said records and bring them into line with the requirements of the regulation, it had the power to either limit the injunction or refuse to grant it altogether.

"An injunction is a relief granted to prevent future misconduct. It does not issue to prevent a practice which has been definitely and permanently discontinued."

Bowles v. Carnegie-Illinois Steel Corp., 149 Fed. (2d) 545, 547.

See, also:

Industrial Association v. U. S., 268 U. S. 64, 45 S. Ct. 403;

Walling v. T. Buettner & Co., 133 Fed. (2d) 306 (C. C. A. 7th);

Shore v. U. S., 282 Fed. (2d) 857 (C. C. A. 7th);

28 *Am. Jur.* 201.

In *Bowles v. Arlington Furniture Co.,* 148 Fed. (2d) 467 (C. C. A. 7th), the Circuit Court said in upholding the District Court's refusal to issue an injunction to enjoin sales above ceiling prices:

"We think it is plain that the acts referred to in these findings were wholly consistent with good faith and a desire on the part of the parties to comply with the regulation and not to violate it. Due to the uncertain and confused situation with which they were confronted, they took such measures as honest and prudent men would take under like circumstances to protect themselves; for this they should not be condemned."

This decision indicates the latitude permitted trial courts in these cases.

IV.

Appellant's Treatment of Bowles v. Augustine, Bowles v. Sanden & Ferguson and Bowles v. Simon Rejected.

An examination of the report of this Court's decision in *Bowles v. Augustine,* 149 Fed. (2d) 93 (C. C. A. 9th), fails to disclose that the Court, at any time, had before it for consideration the latitude and terms of the injunction issued by the District Court. A reading of the case discloses that the question of restricting defendants' acts, both as to present and future regulations issued for the control of prices on meat items, was not considered upon appeal. The sole question raised upon appeal and tried by the Circuit Court of Appeals for the Ninth Circuit was the constitutionality of Section 205 (a) of the Emergency Price Control Act.

Appellant seeks to compare the case of *Bowles v. Sanden & Ferguson,* 149 Fed. (2d) 320 (C. C. A. 9th), to the instant case. In that case this Court ordered that the injunction be broadened to restrict defendants from violating ". . . the General Maximum Price Regulation as heretofore or hereafter amended or revised . . ." (App. Br. p. 17.)

At page 321 therein this Court stated:

> ". . . the proof shows a complete disregard for the violations with no situation comparable to that of Hecht v. Bowles. . . . The judgment should be reversed and the case remanded to issue the injunction prayed for."

It is almost unnecessary to assert that the *Sanden & Ferguson* case *(supra)* does not create any precedent bind-

ing upon the trial court in the instant case, for it is apparent by a reading of the record herein that the defendants did not show "a complete disregard of the regulation." Nor does appellant anywhere claim that they did. Rather, the record shows, and the appellant does not deny, that the defendants herein made efforts to comply with the provisions of the regulation.

Similarly, appellant cites *Bowles v. Simon,* 145 Fed. (2d) 334 (C. C. A. 7th), in support of its contention that the Circuit Court will overrule an abuse of discretion by the trial court. But here again the facts of that case cannot, by the furthest stretch of the imagination, be compared to the facts in the instant case. The Court stated in the *Simon* case that:

> ". . . The defendant's uncooperative and hostile attitude toward the Price Control Act, its enforcement and administration, his repeated violations of the regulations governing rent increases and minimum services, and his flagrant disregard for all warnings of the Administrator, constrains us to hold that the District Court abused its discretion in refusing this injunction."

The record fails to disclose that the defendants herein were flagrant in their violations of the Act. It will rather show an honest, good faith attempt to comply with the Act.

Conclusion.

It is respectfully submitted that the judgment of the trial court should be sustained.

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